IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 14, 2006

# RANDY L. JONES v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Grundy County**
**No. 6699 ad 6577 Thomas W. Graham, Judge**

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**No. M2005-00765-CCA-R3-PC - Filed June 9, 2006**

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The Petitioner, Randy L. Jones, pro se, appeals as of right from the Grundy County Circuit Court's denial of post-conviction relief. In 1997, the Petitioner was convicted of two counts of first degree, premeditated murder, and he received consecutive life sentences for these convictions. Subsequently, the Petitioner filed a petition for post-conviction relief and, after several amendments by the Petitioner and appointed counsel, received an evidentiary hearing. The post-conviction court dismissed the petition, and he now appeals to this Court. In this appeal, he raises seven issues which, in substance, relate to the following claims: denial of his right to self-representation, ineffective assistance of counsel, prosecutorial misconduct, and improper jury instructions. After a review of the record, we affirm the judgment of the post-conviction court denying relief.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Randy L. Jones, Pro Se.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Steve Strain, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

On January 11, 1997, the Petitioner was convicted in the Grundy County Circuit Court of the first degree, premeditated murders of Buster Dewey Caldwell and Marsha Sue Green Anderson. The trial court imposed consecutive life sentences for these convictions. On direct appeal, the Petitioner presented the following issues for review:

(I) whether the evidence is sufficient to sustain the convictions;

(II) whether the trial court erred by permitting the state to impeach witness Mary Perry;

(III) whether the trial court erred by refusing to grant a mistrial or provide a more strongly worded curative instruction following improper impeachment of witness Danny Jones;

(IV) whether the trial court erred by admitting evidence of two prior bad acts by the [Petitioner] and evidence of his parole status;

(V) whether the cumulative effect of trial errors resulted in a denial of due process; and

(VI) whether the imposition of consecutive sentences is excessive or constitutes double jeopardy.

State v. Randy Lee Jones, 15 S.W.3d 880, 883 (Tenn. Crim. App. 1999), perm. to appeal denied, (Tenn. 2000). His challenges to his convictions were found to be without merit, and the convictions were affirmed. Id. However, this Court remanded for resentencing "[b]ecause the trial court erred by imposing consecutive sentences without conducting a sentencing hearing[.]" Id.

As summarized on direct appeal, the facts underlying these convictions established that:

> During the early afternoon of November 14, 1995, Mike Kirk, a criminal investigator for the Grundy County Sheriff's Department, was dispatched to the Marsha Anderson residence in Altamont. When he arrived at the scene, Officer Kirk saw two bodies through an open front door. Sheriff Robert Meeks later identified the victims as Buster Caldwell and Marsha Anderson.
>
> TBI Special Agent Raymond DePriest who conducted an analysis of the crime scene determined that the murders occurred while the victims were eating dinner and watching television. The Anderson residence had been ransacked. No DNA evidence was obtained from the scene and no blood evidence linked the [Petitioner] to the murders.
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> Don Carmen, a ballistics expert for the TBI, found a box of .32 caliber H & R magnum cartridges at the residence which were consistent with the bullets removed from Ms. Anderson. Agent Carmen testified that this ammunition is typically used in a .32 H & R magnum revolver manufactured by New England Firearms. While authorities never recovered the revolver used to shoot Ms.

Anderson, Agent Carmen found a 20-gauge Winchester shotgun-shell wad on the floor and another live Winchester shotgun-shell in Caldwell's front pants pocket. Although he could not link the gun to the murder scene through forensic evidence, Agent Carmen identified a 20-gauge single shot shotgun as the likely murder weapon and determined that Caldwell had been shot from a distance of four to twelve feet.

Dr. Charles Harlan, medical examiner for Robertson County, testified that Caldwell died as the result of a shotgun wound to the chest which penetrated his lung. He stated that Caldwell would have been able to move and speak for three to six minutes. Dr. Harlan testified that Ms. Anderson, who had been shot three or four times in the head, died as a result of a fatal gunshot to the back of her head. Alcohol and Valium was [sic] detected in the blood of both victims.

TBI investigator Larry Davis testified that on November 15, 1995, Wayne Fults turned in a 20-gauge shotgun thought to be the Caldwell murder weapon. He also found a handwritten note in Ms. Anderson's kitchen which provided as follows: "B knows who got TV and T. Best buddy R.J. and M.N. Your Pal." Agent Davis had questioned the [Petitioner] after the murders. The [Petitioner] stated that he and Caldwell had been friends and that on Sunday, November 12, 1995, Caldwell's truck had been stolen and his house robbed. The [Petitioner] claimed that, while he was at Slatton's pool hall in Griffith's Creek, he learned where the truck could be found and on the day after the robbery, he had asked Freddie Meeks, a wrecker operator, to tow the truck back to Caldwell's. The [Petitioner] claimed that Caldwell had accused Bob Rollins of the theft. The [Petitioner] explained the handwritten note as follows:

> [T]he note . . . said it was Michelle Norris [the Petitioner's former girlfriend] and either Baby John or me one, that it had the initials, it didn't say exactly who. [Caldwell] came over to Freddie Meeks' and I was [there] and he showed me the note and he said read this Randy and I read it and said Buster you know where I am at, I am down Neecie's I been down there weeks, he said Randy I know you have, he said whoever done this is trying to set you up. . . .

After the truck was towed to Caldwell's residence, the [Petitioner] went to the residence he shared with his girlfriend Denise "Neecie" Laymon, where he ate and went to sleep. The [Petitioner] said that on the next morning, November 14, he phoned Caldwell but received a busy signal. He claimed that during the afternoon, he and Fults traveled to Whitwell to purchase some tires from Danny Jones and that when he returned around 4:00 P.M., he learned that Caldwell and Ms. Anderson had been killed. The [Petitioner] denied any part in the murders and denied owning any weapons. When asked if his fingerprints would be found on the shotgun, the [Petitioner] had replied in the negative.

Freddie Meeks, a wrecker operator, testified the [Petitioner] employed him to tow Caldwell's truck. The [Petitioner] was accompanied by Caldwell and Ms. Anderson. Meeks stated that Caldwell's truck was not visible from the road but that the [Petitioner] was able to direct him to its location. Meeks recalled that Caldwell had confronted the [Petitioner] with the note and had asked him how he knew where to find the truck.

Wayne Fults, a first cousin to the [Petitioner], acknowledged a prior conviction for burglary and other charges currently pending against him in Grundy County. He testified that three days before the murders he overheard the [Petitioner] threaten to kill Caldwell because he had been "telling his mother stuff and she was telling the cops." Fults stated that Tim Jones, the [Petitioner]'s brother, also heard the [Petitioner] make the threat. On the morning of November 14th, before the bodies were discovered, Fults found a shotgun in a car at Whispering Pines, a plot of land owned by the [Petitioner]'s family. Fults took possession of the weapon and later that morning, when he and his wife, Deborah, met the [Petitioner] and Ms. Laymon, the [Petitioner] had asked him if he had found a gun. The [Petitioner] told him that the gun needed to be "melted down" because "he'd shot somebody with it" and Ms. Laymon confirmed, "Yeah, he did, he really did." That afternoon, the [Petitioner] told Fults that he shot Caldwell and that DeWayne Asberry shot Ms. Anderson. The [Petitioner] revealed that Ms. Laymon was present during the murders. Fults recalled that the [Petitioner] also made incriminating statements while visiting Dave and Charlotte Fults. The [Petitioner] had stated that "he needed to find that gun. It needed to be got rid of." Fults testified that he turned over the shotgun to Agent Davis on the day after the murders and that for several days after the murders, the [Petitioner] had called ten to fifteen times per day to ask if there had been any information announced on the police scanner. Fults denied having cleaned the gun before giving it to Agent Davis and denied having tried to sell the weapon to Donnie Nolan.

Deborah Fults testified that the day the bodies were found, her husband went to Whispering Pines and returned in possession of a shotgun. Ms. Fults recalled meeting the [Petitioner] and Ms. Laymon along the road and that the [Petitioner] asked whether Fults had found a gun at Whispering Pines and also remarked that "whoever had got it needed to know that he had shot somebody with it." Ms. Fults corroborated her husband's testimony regarding the phone calls from the [Petitioner] over the next several days. On cross-examination, Ms. Fults estimated when her husband went to Whispering Pines, he was away for thirty minutes. She stated that Whispering Pines was ten miles from her house.

Mary Perry testified that she was at David and Charlotte Fults' residence on the date of the murders when the [Petitioner] arrived. She recalled that the [Petitioner] warned Wayne Fults that "if he had . . . got a gun out of there that he

needed to get rid of it" because "it could be caught up in something." Apparently, the state expected Ms. Perry to repeat a prior statement she made to Agent Davis that the [Petitioner] had said, "it could be caught up in a murder" and that the gun had been used as "a murder weapon." When the state was permitted to confront Ms. Perry with the content of the prior inconsistent statement, she maintained that her in-court testimony was accurate and that the [Petitioner] had simply said "they had shot a gun the night before." She testified that the [Petitioner] had appeared nervous but contended that he had never admitted to committing a murder. She also observed that Wayne Fults' reputation for truthfulness "ain't too good."

Charlotte Fults overheard the [Petitioner] using the telephone the day Wayne Fults found the shotgun. She testified that she heard the [Petitioner] say, "You better get rid of the gun, or if, if you get caught with it, you're liable to be caught up in a shooting or a murder or something to that." She recalled that the [Petitioner] had indicated that the gun was missing from Whispering Pines. She described the [Petitioner] as acting "strange." On cross-examination, Charlotte Fults acknowledged that she never heard the [Petitioner] confess that he had committed a murder.

Danny Jones, Jr., first cousin to the [Petitioner], testified that he was working in Whitwell on the afternoon of the murders when the [Petitioner] approached him and said, "There's some people killed out on the pipeline at Altamont," or "they had found some people dead." While he recalled asking the [Petitioner] what had happened, Jones "wasn't really for sure" how the [Petitioner] responded. The state had expected him to confirm a prior statement to TBI investigators that the [Petitioner] admitted "he had killed the people." While Danny Jones acknowledged that he might have told investigators that the [Petitioner] had confessed to killing the victims, he contended that his prior statement was not accurate. Thereafter, the trial court refused to permit the state to question him further about the prior statement and instructed the jury that it could not consider any testimony regarding the prior statement. Danny Jones went on to testify that Wayne Fults had been angry with Caldwell because Caldwell had "ragged out" his Mustang and then reneged on their agreement to trade vehicles. Danny Jones also testified that after the theft of Caldwell's truck, he had driven the [Petitioner] to Slatton's pool hall.

James Caldwell, the victim's uncle, identified the shotgun obtained by Agent Davis as being "just like" the one he shared with Buster Caldwell. He testified that on the night before the murders, Buster Caldwell had borrowed his 20-gauge single-shot shotgun and two Winchester shells.

Bradford Meeks testified that sometime in October of 1995, Ms. Anderson had purchased a model R 73 New England Firearms .32 caliber magnum revolver and a fifty-count box of .32 caliber shells at his hunting supply store.

Jason Slatton, who acknowledged a prior conviction for attempted theft for which he is currently serving a three-year sentence in the community corrections program, testified that he worked at a pool hall in Griffith' Creek and knew both the [Petitioner] and Caldwell. Slatton recalled that on the day before the bodies were discovered, the [Petitioner] had stopped by the pool hall shortly after dark and had discussed the location of a pickup truck that Slatton had seen abandoned nearby. He recalled that the [Petitioner] was accompanied by two women and did not remember seeing Danny Jones at the pool hall that night.

Bob Rollins, who acknowledged a prior felony conviction for receiving stolen property, testified that he had loaned Caldwell one hundred dollars several days before the shootings and Caldwell had not repaid him. Rollins stated that after dark on the evening before the bodies were discovered, Caldwell and Ms. Anderson had stopped by his residence. He believed both had been drinking and were armed with a shotgun and a pistol. Rollins testified that Caldwell informed him that his television and truck had been stolen.

Teresa Blubaugh, Ms. Anderson's daughter, testified that in September of 1995, her mother had separated from her husband, Bob Anderson. Ms. Blubaugh recalled that Bob Anderson had threatened to kill her mother.

Donnie Nolan, who acknowledged prior felony convictions for stealing cars and possession of marijuana, claimed that on the night before he heard about the murders, Wayne Fults came to his house and offered to sell him a 12-gauge shotgun. While Nolan conceded that he never saw the weapon, he observed Fults "duck down" when a car passed, as though he "didn't want nobody to see him." Nolan described Fults as "acting real scared."

Regina Hood testified that she went to Ms. Laymon's residence on the date of the murders and asked her to go shopping. She recalled that Ms. Laymon directed her to drive to Ms. Anderson's house. From the driveway, Ms. Hood saw the front door open and the bodies of the victims on the floor. She left immediately. Ms. Laymon telephoned the sheriff's department from a nearby house.

Denise Laymon testified that she and the [Petitioner] were not romantically involved at the time of trial but that, in the fall of 1995, the [Petitioner] was living with her and her daughter. She recalled that during the late evening of November 13th, the [Petitioner], Caldwell, and Ms. Anderson, arrived at her mobile home. She stated that the victims had been drinking and remembered that shortly thereafter DeWayne Asberry arrived. Sometime after midnight, the victims left. Ms. Laymon testified that she then retired to her bedroom and the [Petitioner] followed a few minutes later. Asberry was permitted to sleep on the couch. Ms. Laymon testified that she was quite sure that neither the [Petitioner] nor Asberry left her trailer during

the night. She acknowledged that the next morning, she and the [Petitioner] went to Whispering Pines where they met Wayne and Deborah Fults along the roadway. Ms. Laymon recalled that she was driving and listening to the radio and that the [Petitioner] got out of the car to talk to Fults. She denied hearing the [Petitioner] admit that the he had shot someone and denied saying, "Yeah, he did. Yes, he did." She stated that in the afternoon, she and Ms. Hood decided to go shopping and she intended to ask Ms. Anderson to accompany them. Ms. Laymon suggested they "get out of there" when they arrived at the Anderson residence and saw the victims. She telephoned the sheriff at a nearby house.

Tim Jones, the [Petitioner]'s brother, testified that he did not recall riding in the car with Wayne Fults or hearing the [Petitioner] threaten anyone.

The thirty-year-old [Petitioner] testified that he had previously pleaded guilty to several offenses, including burglary of a business, auto theft, and reckless endangerment. He acknowledged that he had been acquainted with Caldwell for six months and Ms. Anderson for a few weeks. The [Petitioner] recalled that on November 12, 1995, he had given them some furniture from Whispering Pines because Ms. Anderson's house had been "cleaned out." He claimed that on the next day, he and the victims had returned to Whispering Pines for some lamps and Caldwell had informed him that his truck and television had been stolen. The [Petitioner] stated that he met Danny Jones later, told him that someone had stolen Caldwell's truck and television, and asked for a ride to Slatton's pool hall and pawn shop. The [Petitioner] claimed that he thought that the television might have been pawned there. The [Petitioner] stated that he spoke with Jason Slatton, who directed him to a truck that had been abandoned a short distance away. The [Petitioner] testified that he found the truck as he returned to Ms. Laymon's trailer, informed the victims, and arranged for Freddie Meeks to "pull" the truck. While he conceded that the victims followed the wrecker to the stolen truck, the [Petitioner] denied that Caldwell had accused him of the theft or that they had argued about how he had learned where the truck was located. The [Petitioner] claimed that Caldwell was laughing when he approached him with a pistol and a note implicating the [Petitioner] in the theft. The [Petitioner] testified that after towing the truck, he and the victims bought some beer and went to Ms. Laymon's trailer. He stated that Asberry arrived unexpectedly and, shortly past midnight, the victims left. The [Petitioner] claimed that was the last time he saw the victims alive.

The [Petitioner] testified that he ate a can of soup before going to sleep and denied leaving Ms. Laymon's trailer that night. Although he was not positive, he stated that he did not believe that Ms. Laymon or Asberry left either. He claimed that he attempted to call the victims several times the next morning and received a busy signal.

The [Petitioner] recalled that he and Ms. Laymon drove to Whispering Pines and met Wayne and Deborah Fults along the roadway. The [Petitioner] stated that Fults asked him if he had been down to Whispering Pines earlier in the day and that he had replied in the negative. He contended that Fults admitted that he had robbed a house and had hidden some guns at Whispering Pines and that Fults asked if he had taken the guns, to which the [Petitioner] said no. He claimed that shortly after noon, Wayne Fults called and asked him whether David or Leonard Fults had been to Whispering Pines and taken the guns. Later, when he was at David Fults' house, the [Petitioner] called Wayne Fults and informed him that neither David nor Leonard had not been to Whispering Pines and knew nothing about the guns. The [Petitioner] claimed that Wayne Fults then directed him to warn them, "if anybody gets caught with [those guns], they'll get caught with a charge." He explained that as he was leaving David Fults' residence, he did remark, "Oh, yeah, if anybody gets caught with them guns they'll catch a charge."

The [Petitioner] contended that later that afternoon, while he and Wayne Fults drove to Whitwell to talk to Danny Jones, they overheard a police scanner report that a doctor had been called to the Company Farm. The [Petitioner] maintained that Wayne Fults then remarked, "Well, they found somebody dead." The [Petitioner] described Fults as being "in a panic." They took an alternate route home.

On cross-examination, the [Petitioner] maintained that Wayne Fults was a "rogue and a thief" but acknowledged that he and Fults had been convicted of a joint burglary in the past. The [Petitioner] contended that the testimony of Freddie Meeks, Jason Slatton, Danny Jones, and Charlotte Fults was mistaken and that Wayne and Deborah Fults had lied. He claimed that he did not leave Ms. Laymon's trailer on the night the victims were murdered and denied either going to Ms. Anderson's house or shooting Caldwell with a 20-gauge shotgun. He also denied putting the shotgun in the blue Lincoln Continental at Whispering Pines and denied telling Fults that he was angry with Caldwell for statements Caldwell made to his mother regarding activities of the [Petitioner]. The [Petitioner] acknowledged that he was on parole at the time of the offenses.

Wayne Fults, who was recalled by the defense, testified that while he and the [Petitioner] were in Whitwell to see Danny Jones, he "thought" that he heard over the police scanner that Lana Morrison, a former girlfriend of the [Petitioner], had reported to the sheriff' department that someone had "taken a shot at her." When Fults told the [Petitioner] the news, they "hightailed it" out of Whitwell, and took an alternate route home. Fults denied concocting that story to conceal his nervousness about the discovery of the victims at Company Farm. He denied having stolen the guns and hiding them at Whispering Pines.

> Lana Morrison testified as a defense witness that the [Petitioner] returned to live with her on the day after the murders. She stated that she had a police scanner in her trailer at the time and implied that there would have been no need for the [Petitioner] to call Wayne Fults to get information about the murder investigation. On cross-examination she recalled that, during the evening of November 12th, someone shot into her trailer and she had notified the sheriff but no one had investigated. There were no records in the sheriff's department of a dispatch for a shooting incident at the Morrison residence on the day Wayne Fults claimed to have heard the report.
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> Sheriff Meeks, called by the state in response to Ms. Morrison's claims, disputed the veracity of her testimony. He testified that he had investigated the shooting incident at Ms. Morrison's trailer, talked with Ms. Morrison and her mother, and inspected the bullet holes.
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> The parties stipulated that on November 10, 1995, the victim Anderson sold a piece of real estate and received $241.28 in cash and a $3,000.00 check. On September 20, 1995, she sold some farm equipment and was paid $3,200.00 in cash. On September 19, 1995, she sold some livestock for $3,000.00, paid by check. On September 15, 1995, she sold livestock for $600.00 cash.

Id. at 883-88.

On December 15, 2000, the Petitioner filed a pro se petition for post-conviction relief and a subsequent petition on November 29, 2001. The Petitioner retained Mr. William C. Killian to represent him, and Mr. Killian filed an amended petition on August 9, 2002. On the morning of February 10, 2003, the State filed an answer;[1] the same day the matter was set for a hearing. At the inception of the hearing, the Petitioner stated, "Mr. Killian will no longer represent me[.]" Thereafter, the post-conviction court allowed Mr. Killian to withdraw; the Petitioner completed an affidavit of indigency; Mr. Ed Boring was appointed to represent him; and the matter was rescheduled for a later date. The Petitioner then filed an amended pro se petition on March 6, 2003. Mr. Boring moved to withdraw on August 4, 2003, because he had "previously represented a witness that testified unfavorably against the Petitioner in the underlying cause." On January 12, 2004, the post-conviction court granted Mr. Boring's motion to withdraw and appointed Mr. David L. Shinn to represent the Petitioner. Mr. Shinn filed an amended petition on April 9, 2004, and an evidentiary hearing was held on February 14, 2005. The post-conviction court denied relief by written order of March 2, 2005. This timely appeal followed.

[1] The State, upon receiving the petition from the court clerk, shall file an answer within thirty days, unless extended for good cause. Tenn. Code Ann. § 40-30-108. However, failure by the State to timely respond does not entitle the Petitioner to relief under the Post-Conviction Procedure Act. Id.

## ANALYSIS

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

### I. Self-Representation

First,[2] the Petitioner argues that his Sixth Amendment right to self-representation was violated at trial and in this post-conviction proceeding. The Petitioner submits that he requested to represent himself at trial and then again at the motion for new trial hearing; both requests being improperly denied. At the post-conviction level, the Petitioner contends that he was denied due process when the post-conviction court did not allow him to proceed pro se following appointed counsel's unwillingness to argue all claims espoused by the Petitioner.

### A. Trial

The record reflects that Petitioner appeared before the Grundy Circuit Court for arraignment on September 20, 1996. Prior to arraignment, the Petitioner filed a "Motion to Waive Counsel" on August 15, 1996.[3] At arraignment, the Petitioner stated, "By a motion of this court I waive counsel in this case." The trial court responded, "Well, I don't believe we'll be waiving counsel. We might let you assist in your own matters, but I, on a first degree murder case, I'm not too inclined to do that." The trial court then went on to discuss the appointment of counsel and instructed the Petitioner, "[A]t this time you'll need to fill out an affidavit showing your status and then I'm assuming I'm going to appoint the public defender's officer to represent you." Thereafter, the trial court spoke with Mr. Paul Cross about his ability to accept the appointment in the Petitioner's case. In response to this discussion, the State interjected, "Judge, he's telling the Court that he wants to represent himself without an appointment." The following discussion then occurred:

> THE COURT: I know, but do you want to bring him out now and do that?
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> . . .

[2] For the sake of clarity, we have re-ordered the issues from the manner in which they were presented by the Petitioner in his appellate brief and have also combined claims that dealt with the same issue.

[3] This motion does not appear in the technical record of the trial. However, the motion is included in the post-conviction technical record; it is attached to the Petitioner's pro se "Motion Requesting Recusal of Presiding Judge." Despite numerous pro se motions being admitted as exhibits at the post-conviction hearing, this motion was not introduced into evidence.

GENERAL HEMBREE: He's telling the Court he wants to represent himself without appointment.

THE COURT: I understand, but I'm not going to let him walk out of here in that status, you know.

. . . .

THE COURT: All right, let's just go ahead and bring him out.

Mr. Jones, it does turn out that we're not going to be able to appoint the public defender's office so we have appointed, assuming that you qualify, I'm sure if you're incarcerated you will qualify. Did you fill out an affidavit?

MR. JONES: No, sir.

THE COURT: All right, we need to get that done and to the Court. Let me ask you under oath. Raise your right hand.

. . . .

THE COURT: Well, okay, yeah, let me ask. You don't have a lawyer at this time or do you? Do you have somebody that you want to hire?

MR. JONES: I'm in the process. I don't have them hired at this time.

THE COURT: All right. What I'm going to do, because you have no income. Do you have any ability directly to hire a lawyer?

MR. JONES: No, sir.

THE COURT: We're going to appoint Mr. Cross. You have every right if you can through whatever means, if someone will hire a lawyer to represent you that's fine and at that point we'll be happy to relieve Mr. Cross of his obligations, but if that doesn't work out Mr. Cross has been appointed to represent you. . . .

. . . .

THE COURT: . . . Your attorney has entered a not guilty plea. Now, you need to work with him. I'm not telling you that you can't represent yourself, but I certainly would caution you not to do that, but Mr. Cross at this point is going to be your attorney. If you decide for some reason you think you can do a better job than he can and I would say that you could not, but if you decide that you wanted to do

> that, he would be appointed your, what we call, elbow counsel, which means that he would be at counsel table, but I would suggest that it's in your best interest to use his services in the defense of your case. . . .

Thereafter, a motion hearing was held on October 29, 1996. At the beginning of the hearing, the parties engaged in the following colloquy:

> GENERAL HEMBREE: The next thing, and this is to be the first thing decided today, does Mr. Jones continue to represent himself.
>
> THE COURT: What's your resolution on that situation?
>
> MR. CROSS: Well, I'm representing him, Your Honor.

Mr. Cross ("Trial Counsel") proceeded to present the Petitioner's motions and represented the Petitioner throughout the trial proceedings.

A criminal defendant has a right to be represented by counsel or to represent himself and proceed pro se without the assistance of counsel. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; Faretta v. California, 422 U.S. 806, 819 (1975); State v. Northington, 667 S.W.2d 57, 60 (Tenn. 1984). The right to represent oneself exists "despite the fact that its exercise will almost surely result in detriment to both the defendant and the administration of justice." State v. Robert Hood, No. W2004-01678-CCA-R3-DD, 2005 WL 2219691, at *11 (Tenn. Crim. App., Jackson, Sept. 13, 2005) (quoting State v. Fritz, 585 P.2d 173, 177 (Wash. Ct. App. 1978)). The right is not absolute, however. Id. To activate the right of self-representation, a defendant must: (1) timely assert the right to proceed pro se; (2) clearly and unequivocally exercise the right; and (3) knowingly and intelligently waive his or her right to assistance of counsel. State v. Herrod, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988).

Resolution of this issue depends on whether the Petitioner clearly and unequivocally exercised the right. The post-conviction court found that

> the Court made it quite plain to the Petitioner that he had the absolute right to represent himself. The fact that the Court discouraged this did not take away the Petitioner's right and he waived same by allowing the case to go completely to completion without raising the matter again. Petitioner can not take advantage of counsel and the Court in this fashion.

We agree.

The constitutional right to self-representation is waived if not timely and unequivocally asserted. Moreover, we recognize that courts should indulge every reasonable presumption against finding that a defendant has waived the right to counsel. Hood, 2005 WL 2219691, at *13 (citing State v. Vermillion, 51 P.3d 188, 193 (Wash. Ct. App. 2002)). A careful review of the entire arraignment transcript clearly establishes that the trial court informed the Petitioner of his right to represent himself and, further, advised him of the perils of self-representation. The trial court inquired of the Petitioner at the October 29th hearing if he wished to proceed with counsel or represent himself. At that time, Trial Counsel stated that he was representing the Petitioner, and the Petitioner made no indication that he wished to exercise his self-representation right. The technical record contains numerous pro se filings by the Petitioner. Had the Petitioner been adamant in his desire for self-representation, he clearly was capable of filing an appropriate waiver. See Tenn. R. Crim. P. 44(a). The record in this case demonstrates that the Petitioner did not unequivocally assert his right to self-representation.

Even if we were to view the Petitioner's conduct as activating his right to self-representation, "an unequivocal request may be waived by subsequent words or conduct." Hood, 2005 WL 2219691, at * 12 (citations omitted). The Petitioner waived his right to self-representation when he failed to reassert a desire to proceed pro se and allowed counsel to participate in trial. See id. at *13. For the foregoing reasons, we conclude that the request did not constitute an unequivocal assertion of the right.

**B. Motion for new trial**

The Petitioner also claims that he was denied his right to proceed pro se at the motion for new trial hearing, which was held on April 14, 1997. The Petitioner states that the trial court "refused to hear [him] and refused to remove counsel" and, thus, denied him "the right to effective assistance of counsel on direct appeal." The Sixth Amendment right to proceed pro se does extend to the motion for new trial hearing. See State v. Gillespie, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994).

On the morning of the new trial hearing, the Petitioner filed an "Amended Motion in Brief Motion for a New Trial" wherein he alleged that he received the ineffective assistance of counsel. The record reflects the following colloquy at the outset of the hearing:

> MR. CROSS: It turns out as Your Honor probably knows I have filed a motion for new trial and an amendment thereto and Mr. Jones has filed a number of pro se motions most of which duplicate what I filed although there may be a slight variation in a place or two. He has filed something else as recently as this morning. I guess I do not have a copy of it, and he is alleging some things that may require me to file a motion to withdraw from the case. So. . . .
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> . . . .
>
> THE COURT: Let me say this, you know, the only way we can proceed on a motion for a new trial outside something that I can't even imagine or [sic] is for the

attorney that tried the case to handle that, and I [sic] just not going to allow a person to pro se come in the middle of an already tried case and decide that they're going to start defending themselves. You know, if it's that bad later on there is a post conviction relief or whatever available, but that makes no sense at all to -- after the case is tried and the decision is made to have appointed counsel, or any counsel for that matter to have an individual defendant say, okay, I believe I can do a better job at this stage, I'll take over from here. I don't believe that's appropriate. I don't think the Court's required to do that, and you know, barring something, I mean, I guess you could have a situation where an attorney was found to be so corrupt or something that they should not proceed on, but I'm sure that in this case I would think they would be just be [sic] technical issues of some sort and I'll be happy to hear any motion he has, you know, to point out what problems he may have with counsel, but I'm not going to let him handle this case. Not at this point, that just doesn't make sense, Mr. Jones, I mean we can't do that.

MR. CROSS: He's asking for continuance.

. . . .

THE COURT: I will do -- the motion for new trial should be argued today. If there's some issue about counsel that he wants to raise in more detail later on he can do that, but really and truly that's -- you know, I don't -- I guess he really can't do that because, well, at some point along the way when this thing truly goes up on appeal it's going to be too late to re-open, but I guess that he [sic] there would be enough time between now and whatever time he's asking to be heard on the issue of counsel that we can hear that later and still keep it at trial level. I'd be willing to set aside any ruling on [sic] motion for new trial if there was substantial enough grounds to say that either should be able to argue additional points or have new counsel, so I think the best way to do [sic] is go ahead and hear the motion for new trial now. His matter will need to be assuming, let's just assume that you don't prevail, if you prevail then you've got a whole different ball game, but if you don't prevail on your motion for new trial there'll still be time for him to come before the Court and point out problems he may have with counsel and if they're legitimate we can still do something different. . . .

. . . .

THE COURT: Okay, Mr. Jones have a seat and we'll -- you know, with regard is there anything, we'll just hear Mr. Jones' motion on counsel when he's ready to go. He doesn't want to hear that right now, is that the continuance he's asking for? I'm not going to continue, I've already said I'm not going to continue the motion for new trial, but if he has a problem he'll have a chance to argue his motion on counsel.

> MR. JONES: It was amended motion in brief for -- to a motion -- to a new trial and it amended some allegations of ineffective and some other allegations that hadn't been brought up yet.
>
> THE COURT: Okay, we'll let that be heard at another time, it's not appropriate to hear that right now.

The motion for new trial hearing proceeded with appointed counsel, and the motion was thereafter denied.

Trial courts are not required to set aside prior appointment of counsel and appoint new counsel in the absence of good cause. Tenn. Code Ann. § 40-14-205 (court "may" allow appointed counsel to withdraw upon showing of good cause); United States v. Davis, 365 F.2d 251, 254 (6th Cir. 1966); United States v. Burkeen, 355 F.2d 241, 245 (6th Cir. 1966); 9 David Louis Raybin, Tennessee Practice, Criminal Practice and Procedure § 5.56 (1984 & Supp. 1997). Similarly, when an accused seeks to substitute counsel, the accused has the burden of establishing that: (1) the representation being furnished by counsel is ineffective, inadequate, and falls below the range of competency of defense counsel in criminal prosecutions, (2) the accused and appointed counsel have become embroiled in an irreconcilable conflict, or (3) there has been a complete breakdown in communications between them; whether an accused is entitled to a substitution of counsel is a question which addresses itself to the sound discretion of the trial court. State v. Gilmore, 823 S.W.2d 566, 568-69 (Tenn. Crim. App. 1991).

We find the case of People v. Bull, 705 N.E.2d 824 (Ill. 1998), instructional under the facts as presented. In Bull, the Illinois Supreme Court stated:

> When a defendant presents a *pro se* post-trial claim of ineffective assistance of counsel, the trial court may, under certain circumstances, appoint new counsel to assist the defendant in presenting his claim. However, the trial court should first examine the factual basis for defendant's claims. After this examination, if the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then new counsel need not be appointed and the *pro se* motion can be denied. However, if the allegations show possible neglect of the case, new counsel should be appointed. The appointed counsel can then independently evaluate the defendant's claim and would avoid the conflict of interest that trial counsel would experience if she had to justify her actions contrary to her client's position. The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the *pro se* defendant's allegations of ineffective assistance of counsel.

Bull, 705 N.E.2d at 839-40; see also People v. Smith, 863 P.2d 192, 196-201 (Cal. 1993).

In the present case, the trial court did not adequately inquire into the Petitioner's allegations of ineffective assistance. The trial court refused to hear from the Petitioner, stating that "it's not appropriate to hear that right now." However, under the facts of this case, a more favorable result would not have occurred had the ineffective allegations been entertained. See generally State v. Rubio, 746 S.W.2d 732 (Tenn. Crim. App. 1987) (trial judge did not abuse his discretion in refusing to relieve trial counsel where there was nothing in the record to indicate that counsel was anything but effective in presenting the case). Nothing in the record remotely suggests that the Petitioner proceeding pro se or with substitute counsel would have obtained a new trial or more lenient sentence. Jeffrey T. Aflleje v. Warden, No. C-01-2849 VRW, 2002 WL 1998276, at *7 (N.D. Cal Aug. 22, 2002). We therefore conclude that the trial court did not commit reversible error in refusing to allow the Petitioner to discharge his attorney for purposes of presenting the post-trial motion based on ineffective assistance.

**C. Post-conviction Proceedings**

The Petitioner contends the post-conviction court violated his Sixth Amendment right to self-representation by denying his request to represent himself at the post-conviction hearing. Specifically, he argues that due process was violated when the post-conviction court limited the scope of the evidentiary hearing by declining the Petitioner's request to discharge his attorney and proceed pro se after appointed counsel refused to raise the additional claims outlined in his petition and amendments; thus, waiving the issues. We respectfully disagree.

The United States Supreme Court has held that the scope of the Due Process Clause does not extend to post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 554-55 (1987). Our supreme court has held that "'the opportunity to collaterally attack constitutional violations occurring during the conviction process is not a fundamental right entitled to heightened due process protection.'" State v. Stokes, 146 S.W.3d 56, 60 (Tenn. 2004) (quoting Burford v. State, 845 S.W.2d 204, 207 (Tenn.1992)). There is no constitutional right to counsel in post-conviction proceedings, and "'there is no constitutional right to effective assistance of counsel in post-conviction proceedings.'" Id. (quoting House v. State, 911 S.W.2d 705, 712 (Tenn. 1995)). All that "due process requires in the post-conviction setting is that the petitioner have 'the *opportunity* to be heard at a meaningful time and in a meaningful manner.'" Id. at 61 (quoting House, 911 S.W.2d at 711).

Our supreme court has provided that a post-conviction attorney is required to fulfill the following obligations and responsibilities:

> Appointed or retained counsel shall be required to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses,

> including petitioner and prior counsel, and diligently investigate and present all reasonable claims.

Tenn. Sup. Ct. R. 28, § 6(C)(2). Counsel is also to file a certification indicating that he or she has thoroughly investigated the possible constitutional violations, has discussed the possible constitutional violations with the petitioner, and has raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Tenn. Sup. Ct. R. 28 app. C.

> [T]hese standards illustrate the balance between counsel and a petitioner in determining the course and conduct of a post-conviction proceedings. Counsel is obligated to review the petition; file an amended petition if necessary; interview the petitioner; interview *relevant* witnesses; and investigate and present "*all reasonable claims*." Tenn. Sup. Ct. R. 28, § 6(C)(2) (emphasis added). The rules also provide that counsel is to certify that all "non-frivolous constitutional grounds" have been asserted. Tenn. Sup. Ct. R. 28, § 6(C)(3), app. C. Counsel must consult with the petitioner where feasible but retains the right to make strategic and tactical decisions - including the determination of which issues are reasonable and should be raised and pursued - based on counsel's professional judgment. Counsel is in no way obligated to comply with a petitioner's demands to investigate or pursue unreasonable or frivolous claims.

Leslie v. State, 36 S.W.3d 34, 38 (Tenn. 2000).

At the conclusion of testimony by the Petitioner's trial counsel, the following exchange occurred in the post-conviction court:

> MR. JONES: Your Honor, I've got other issues that I want to make an offer of proof on concerning Mr. Cross and some other witnesses that Mr. Shinn --
>
> THE COURT: We're either going to follow the rules or not.
>
> MR. JONES: Well, he can't waive my issues, though, Your Honor. He has to preserve my issues and I'd like to make an offer of proof.
>
> MR. SHINN: I mean, I'm to the point I'm finished with Mr. Cross. Mr. Jones says he's got other issues and I've told him that I've come to the point this is, this is all the issues that I was going to raise.
>
> THE COURT: This is something I know for sure, that at this point Mr. Jones has requested counsel. There's no question that he's requested counsel and we've

never allowed folks just to jump up and do anything they wanted to or submit proof that their counsel doesn't think is in their own best interest.

. . . .

MR. SHINN: Well, Your Honor, it's my understanding he has some issues that he wants presented about, that regard impeachment of various witnesses, which in my opinion they're either collateral issues, they're not going to go to any type of prejudice. Mr. Jones disagrees and that's where we're at. I believe we've raised the issues that he has the best opportunity either to --

THE COURT: To prevail on.

. . . .

THE COURT: Well, I think that we're going to have to rely on counsel for that. Mr. Shinn knows full well that you are an intelligent individual that has pursued lots of angles at this, which is fine, you should do that, but in the end he's the one with the legal expertise that has been appointed to represent you at your request this time.

. . . .

MR. JONES: And I'm now invoking my common law right to self-representation in that he's waiving my issues.

THE COURT: No, you have waived -- the legal position is you've waived your right to act pro se by allowing Mr. Shinn to represent you on these matters, so anyway, that's the position of the Court. Okay.

MR. SHINN: . . . . Your Honor, before she takes the stand, Mr. Jones has asked me to request the Court if I may withdraw at this point in time. He stated that if I continue he's going to file an ethical complaint against me. I guess, if it results in a conflict between me and Mr. Jones --

THE COURT: Of course, this is endless and that's what the problem is, it's endless. I mean this can always occur. You had one more witness to present. What would be unethical about you presenting a witness you thought was meaningful to his case?

MR. SHINN: He's asked me to make the request, Your Honor.

THE COURT: Well, I'm going to deny that motion.

Post-Conviction Counsel questioned the remaining witness, and the Petitioner did not testify at the post-conviction hearing.

The record reveals that the Petitioner's counsel filed an amended petition and presented all reasonable claims in that petition. Also, counsel filed the required certification, which stated that he had discussed all possible constitutional grounds with the Petitioner and that he had raised all non-frivolous constitutional grounds in the amended petition. Therefore, the Petitioner's post-conviction counsel met the guidelines set out by the Tennessee Supreme Court. Jerry D. Carney v. State, No. M2002-02416-CCA-R3-PC, 2005 WL 351238, at *4 (Tenn. Crim. App., Nashville, Feb.14, 2005). "[W]hen a petitioner seeks and obtains the aid of counsel through court appointment, the petitioner needs to understand that the right to make the large majority of the decisions relating to the conduct of the case then rests with the attorney." Michael Wayne Perry v. State, No. M2003-02510-CCA-R3-PC, 2004 WL 1908810, at * 2 (Tenn. Crim. App., Nashville, Aug. 25, 2004).

Moreover, the Petitioner's grounds for post-conviction relief were fully and fairly heard by the post-conviction court. The post-conviction court gave Post-Conviction Counsel ample latitude to pursue the claims deemed reasonable. Moreover, in its order denying relief, the post-conviction court stated:

> At the conclusion of the presentation of proof [at the post-conviction hearing], the Petitioner stated he wished to fire his attorney because his attorney would not present all of the various arguments he had set forth in previous pro se pleadings. Counsel represented that he believed he had covered all issues which had substance, and the Court did not require counsel to argue motions which he thought were baseless. In an attempt, however, to bring this matter to a close, the Court has reviewed all Petitions and amendments and has found no proof which would support a finding of ineffective assistance of counsel. . . . Furthermore, as to the second prong, this Court has reviewed the conclusory allegations of prejudice set forth in the numerous pro se pleadings and finds none of the alleged errors could have reasonably caused the verdict to be unreliable.

In Stokes, "our Supreme Court concluded that there was no due process violation because there is no right to effective assistance of counsel for post-conviction proceedings and 'the petitioner was afforded a full evidentiary hearing and full review in his first-tier post-conviction appeal.'" Carney, 2005 WL 351238, at *5 (quoting Stokes, 146 S.W.3d at 61)). The same is true in this case. The Petitioner was also afforded a full evidentiary hearing, and this case is his first-tier post-conviction appeal. Id. Accordingly, we conclude that the Petitioner was definitely given the opportunity to be heard at a meaningful time in a meaningful manner. Id.; see also Randy Caldwell v. State, No. M2001-00334-CCA-R3-PC, 2002 WL 31730875, at *15 (Tenn. Crim. App., Nashville, Dec. 4, 2002).

## II. Ineffective Assistance

Next, the Petitioner contends that he received the ineffective assistance of counsel. His argument is based upon the following allegations of deficient representation: (1) Trial Counsel had an actual conflict of interest due to previous representation of prosecution witness Charlotte Fults, (2) Trial Counsel was ineffective by failing to notify the State that Mary Perry and Danny Jones repudiated their pretrial statements, (3) Trial Counsel was ineffective for not calling Crystal Nunley to testify, (4) Trial Counsel was ineffective in closing argument, (5) Trail Counsel was ineffective by failing to introduce the criminal record of prosecution witness Freddie Meeks, and (6) Trial Counsel was ineffective for failing to object to hearsay statements.[4]

As previously stated, the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the petitioner's lawyer, and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The petitioner bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The petitioner's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

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[4] The Petitioner's remaining allegations of ineffectiveness are waived due to failure to present these allegations for determination in the post-conviction court. See Tenn. Code Ann. § 40-30-106(g). As previously discussed, the waiver of these allegations does not violate the Petitioner's due process rights.

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law--such as whether counsel's performance was deficient or whether that deficiency was prejudicial--are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id.

**A. Conflict of Interest**

On October 22, 1996, approximately two and half months before the Petitioner's trial, a search warrant was executed at the home of David and Charlotte Fults. Charlotte Fults testified as a prosecution witness in this case. During the search, Special Agent Don Earle, Tennessee Alcoholic Beverage Commission, told

> Mrs. Fults and Mr. Fults if they would come down to his office that afternoon and basically answer some questions, get fingerprinted, that he wouldn't charge them right then, he would take it before the grand jury and get an original indictment, so he wouldn't arrest them right on the spot. They agreed to that.

Both David and Charlotte Fults testified that they then phoned attorney Paul Cross, the Petitioner's trial counsel, to accompany them to Agent Earle's office and that Mr. Cross did in fact accompany them to the meeting later that evening. David Fults stated that he asked Mr. Cross to accompany him "really to defend me" and that he paid Mr. Cross a "hundred dollars to go down there and back." Charlotte Fults testified Mr. Cross was there to "advise us." Mr. and Mrs. Fults were not charged with a crime until March of 1997. Mr. Cross represented Mrs. Fults after her indictment, and the charges were ultimately dropped against Mrs. Fults.

The Petitioner asserts that Trial Counsel's former representation of Mrs. Fults created a conflict of interest in counsel's representation of him at trial. Trial Counsel testified regarding his representation of Mrs. Fults:

> I remember talking to [David] and Charlotte at some point. Now, I went back and looked up to see whether I had a file on Charlotte or not and I did have a file. It looks from the file like the first conversation we had was April 3, 1997. That's what my note says, and it was a note that looked to be like I was just coming up to speed on whatever it was that they were calling about. Now, I won't dispute there may have been a phone call that preceded it by several months, but it looks like my first involvement even as far as just learning what it was about occurred April 3, 1997.

He further testified that he did not recall accompanying the Fultses to Agent Earle's office but stated:

> "I'm not saying that I didn't, but I don't recall it. I do recall, I think I recall something having been said at some point in time. I was alerted that something was going on, but apparently wasn't significant enough at that point in time to open a file, because my file was opened April 3, of '97."

It is unquestioned that "an accused is entitled to zealous representation by an attorney unfettered by a conflicting interest." State v. Thompson, 768 S.W.2d 239, 245 (Tenn. 1989). An actual conflict of interest is usually defined in the context of one attorney representing two or more parties with divergent interest and exists where an attorney is placed "in a position of divided loyalties." State v. Tate, 925 S.W.2d 548, 553 (Tenn. Crim. App. 1995). A conflict "may exist anytime a lawyer cannot exercise his or her independent professional judgment free of 'compromising influences and loyalties.'" State v. Culbreath, 30 S.W.3d 309, 315 (Tenn. 2000) (citing Tate, 925 S.W.2d at 554).

When counsel is unable to provide a "zealous representation . . . unfettered by conflicting interest," there has been a breach of the right to the effective assistance of counsel. Thompson, 768 S.W.2d at 245. The United States Supreme Court has held that, because there is a breach of loyalty in cases involving a conflict of interest, prejudice is presumed. Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980). Unless the petitioner can establish that his counsel "actively represented conflicting interests," he has not established the constitutional predicate for his claim. Id. at 350. To establish a claim based upon conflict of interests, the conflict must be actual and significant, not irrelevant or "merely hypothetical." Terrence B. Smith v. State, No. W2004-02366-CCA-R3-PC, 2005 WL 2493475, at *5 (Tenn. Crim. App., Jackson, Oct. 7, 2005) (citations omitted). Generally, prejudice will only be presumed when the conflict of interest arises in cases involving representation of serial or co-defendants. Id. (citation omitted).

The post-conviction court denied relief, specifically finding that the testimony presented on the conflict of interest issue did not "support a finding that the Petitioner was prejudiced sufficiently to cast doubt on the reliability of the conviction." We agree. The record before us does not establish that an actual conflict existed. Even if we presume that Trial Counsel did represent Charlotte Fults at the meeting with Agent Earle, there is no proof that this representation had any effect upon his representation of the Petitioner. Id. at *6. Trial Counsel's prior representation of Mrs. Fults was totally unrelated to the instant case. Nothing in the record establishes any form of continuing relationship between Mrs. Fults and Trial Counsel until she retained him following the Petitioner's trial. There was no proof presented that shared confidences were violated due to the representation. Thus, neither deficient performance nor prejudice was established. Id.

**B. Impeachment Evidence**

On direct appeal, the Petitioner argued that the trial court erred by permitting the State to impeach prosecution witness Mary Perry with her prior inconsistent statement and the trial court erred by refusing to grant a mistrial or give a more strongly worded curative instruction following improper impeachment of prosecution witness Danny Jones. Jones, 15 S.W.3d at 883. A party may not call a witness to testify for the primary purpose of introducing a prior inconsistent statement that would otherwise be inadmissible. State v. Mays, 495 S.W.2d 833, 837 (Tenn. Crim. App. 1972). Impeachment cannot be a "mere ruse" to present to the jury prejudicial or improper testimony. State v. Roy L. Payne, No. 03C01-9202-CR-00045, 1993 WL 20116, at *2 (Tenn. Crim. App., Knoxville, Feb. 2, 1993).

In concluding that no error occurred in the trial court, this Court provided the following relevant facts on direct appeal:

> At trial, Ms. Perry testified that the [Petitioner] stated he had warned that the gun could be "caught up in something." When the prosecutor asked her if she remembered telling Agent Davis that the [Petitioner] said "caught up in a murder," defense counsel requested a jury out hearing and argued that the state should not be permitted to impeach Ms. Perry with her out-of-court statement. The trial court ruled that the state could inquire about the prior statement but that the statement itself was not admissible. The prosecutor then questioned Ms. Perry as follows:
>
> Prosecutor: [D]o you remember telling [Agent] Davis that [the Petitioner] said the gun was used as a murder weapon?
>
> Ms. Perry: No. He said that they had shot a gun the night before.
>
> On cross-examination by defense counsel, Ms. Perry stated that she had recently informed defense counsel that portions of the statement were inaccurate. She testified that she would "stand by" her in-court testimony. The trial court provided no contemporaneous limiting instruction. In the jury charge, however, the trial judge included in his instructions that proof of a prior inconsistent statement was probative only of credibility and was not to be considered as substantive evidence of the matter asserted in the statement.
>
> Clearly, Ms. Perry's testimony at trial was inconsistent with her pretrial statement. The record demonstrates that defense counsel had not notified the state that Ms. Perry had repudiated the accuracy of portions of her pretrial statement. There is no proof here that the prosecutor called Ms. Perry as a pretext or ruse to introduce her prior statement. Perhaps the better practice would have been for the trial court to provide a contemporaneous instruction, limiting the jury's consideration of the testimony to credibility only; in our view, however, the rule, under these

circumstances, permits the state to question Ms. Perry about her prior inconsistent statement.

. . . .

At trial, Danny Jones could not recall "for sure" what he had said in his pretrial statement:

> I told [the TBI agent] something, I think he reworded it, but, because my words about saying something isn't always accurate with what should have been said, but *at that time I said that [the Petitioner] said he had killed the people.*
>
> And if you want me to read [the statement], I'm not very good at reading, and I tried to read it about an hour ago and a lot of those words are pulled together and I don't have my glasses on.

(Emphasis added). Defense counsel objected and asked for a jury out hearing. Danny Jones acknowledged that he had been charged with a felony offense and, just prior to trial, had reached a plea agreement for a suspended sentence of three years. The trial court inquired whether the witness could state under oath that the [Petitioner] had admitted killing the victims. Danny Jones replied, "I can't state under oath that he said, I did kill them, but I think that in my mind I did come up with it since he did come and told me about the two murders that he just heard over the scanner. . . . " The trial court recessed to review the case law governing the issue. The next morning, the trial court determined that, under Mays and [State v.] King, [215 S.W.2d 816 (Tenn. 1948),] the state could not impeach Danny Jones with his prior statement because the witness had only a "foggy memory" and had not prejudiced the state by his testimony. The trial court provided a lengthy curative instruction to the jury. When Danny Jones returned to conclude his testimony, the state requested that he be declared a hostile witness but the trial court refused. The state then canceled the plea agreement with him and questioned him about his involvement in the burglary of the Caldwell's truck. Danny Jones asserted his Fifth Amendment right against self-incrimination.

. . . .

. . . Under the current rules of evidence, the state, having no notice that Danny Jones had repudiated his prior statement, was entitled to impeach him with it. *See* Tenn. R. Evid. 607 & 613.

Jones, 15 S.W.3d at 892-93.

In this post-conviction appeal, the Petitioner argues that Trial Counsel was ineffective for failing to notify the State that these two witnesses had repudiated their statements, thereby, allowing the prior incriminating statements into evidence. In response to the question of whether he knew beforehand that Danny Jones would repudiate his pre-trial statement, Trial Counsel testified:

> I knew, I suspected that he [w]as going to be somewhat weaker from the standpoint of the State when he got on the witness stand than he had originally told them, yes. Exactly where he would go I wasn't for sure. I thought he was wobbly and really the same thing is true of Mary Perry.

The post-conviction court concluded that Trial Counsel made a reasonable strategic decision, finding that "Attorney Cross pointed out his reluctance to make such a pre-trial notification since the more favorable testimony could have been helpful." Such a ruling implies that Trial Counsel was aware that the witnesses would repudiate their pre-trial statements and, under such circumstances, we could not conclude that failure to notify the State was reasonable trial strategy, as such notification would have precluded admissibility of the statements. However, the Petitioner suffered no prejudice as the testimony of Wayne and Deborah Fults, not the testimony of Mary Perry and Danny Jones, established proof of the corpus delicti. Id. at 891.

**C. Failure to Call a Witness**

The Petitioner contends that Trial Counsel was ineffective for failing to call Crystal Nunley to testify that the victim Caldwell had indicated the note, implicating the Petitioner in a theft of the victim's property, was nothing more than a joke. The Petitioner contends that threats were being made against Ms. Nunley by the State "to coerce her into not testifying because her testimony was favorable" to the defense.

Regarding the credibility of Ms. Nunley, Trial Counsel testified at the post-conviction hearing:

> With Ms. Nunley it wasn't so much the criminal record as it was, I just had the feeling, well, it was more than a feeling. Some of the things she said could not be squared with other things that were almost had [sic] to be taken as facts in the case.

As a reviewing court, we will not second guess tactical choices made by Trial Counsel. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); see also Rearno Vaughn v. State, No. M2004-00544-CCA-R3-PC, 2005 WL 1025762, at *21 (Tenn. Crim. App., Nashville, Oct. 24, 2005). Here, Trial Counsel made a tactical choice not to present Ms. Nunley as a witness based upon perceived credibility problems. We will not second guess that decision. Moreover, as noted on direct appeal, the Petitioner was "provided an opportunity to explain the note and denied any involvement in the

burglary and theft." Jones, 15 S.W.3d at 895. Thus, the Petitioner has also failed to show prejudice.

**D. Closing Argument**

The Petitioner contends that Trial Counsel was ineffective during closing argument, when counsel stated:

> We can't eliminate the possibility that this man was involved. I can't sit here and eliminate it altogether. If you vote for acquittal you are going to be taking a chance of freeing a guilty man. Some chance. But I submit to you that if you vote for conviction you're going to be taking a much bigger chance that you are sending a innocent person to the penitentiary for the rest of his life.

The Petitioner argues that such a statement "resulted in an actual and substantial disadvantage" to his alibi defense.

At the post-conviction hearing, Trial Counsel explained:

> I think it's important in a jury argument to level with the jury, and I think you lose some of your impact with the jury if you make to them, if you give to them a statement that's all encompassing, too broad, they're going to tune you out. Obviously, there was evidence in this case that would point in both directions. My objective was to acknowledge that, but then to argue that the better reason [sic] position would be to vote for not guilty.

The post-conviction court found that this issue was without merit, noting that "[t]his statement was merely made in passing in the final argument, presumably for the purpose of creating some reasonable doubt even if the alibi was not accepted."

We find no error of any type on the part of counsel during closing arguments; moreover, such a statement did not render the verdict unreliable. Generally, lawyers are permitted great latitude during closing arguments. State v. Dooley, 29 S.W.3d 542, 552 (Tenn. Crim. App. 2000). Counsel in this case acted within the range of competence demanded of attorneys in criminal cases during closing arguments. Barton L. Hawkins, No. W2001-00738-CCA-R3-PC, 2002 WL 1549572, at*14 (Tenn. Crim. App., Jackson, Jan. 18, 2002). The Petitioner's allegation of ineffective assistance on this ground cannot be supported.

**E. Use of Criminal Record**

At the post-conviction hearing, the Petitioner argued that Trial Counsel was ineffective for failing to impeach prosecution witness Freddie Meeks with his prior criminal record. At trial, "Meeks recalled that Caldwell had confronted the [Petitioner] with the note and had asked him how he knew where to find the truck." Jones, 15 S.W.3d at 884. It appears from the record that Meeks "was on federal parole at the time [of trial] on some stolen cars, theft charges[.]" Trial Counsel

testified that Meeks was a reluctant witness for the State and that Meeks was "sort of wishing [he] had never talked to the State's investigators." The Petitioner has not shown that he was prejudiced by counsel's failure to introduce Meeks' prior record into evidence.

**F. Hearsay Statements**

Finally, the Petitioner contends that Trial Counsel was ineffective for failing to object to certain hearsay statements during the testimony of Wayne Fults. Wayne Fults testified at trial that the Petitioner told him that the gun needed to be "melted down" because "he'd shot somebody with it" and that Ms. Laymon confirmed, "Yeah, he did, he really did." Jones, 15 S.W.3d 884-85. The State attempted to elicit the same testimony from Deborah Fults; however, during Mrs. Fults' testimony Trial Counsel objected on hearsay grounds. Following the objection, the trial court ruled that Mrs. Fults could testify to any statements made by the Petitioner but that she could not testify to the statements of Ms. Laymon, as such was inadmissable hearsay. The Petitioner contends that Trial Counsel was ineffective "by failing to properly object to David Wayne Fults . . . being . . . allowed to testify that Denise Laymon responded, 'Yeah, he did, he really did.'" He further posits that such ineffectiveness is evidenced by the sustaining of the objection during Deborah Fults' testimony. The significant statement during this exchange was the inculpatory statement attributable to the Petitioner himself, not Ms. Laymon. Additionally, Ms. Laymon was given the opportunity to explain her statement in front of the jury. The Petitioner has failed to demonstrate that the verdict is unreliable based on the admission of Ms. Laymon's statement.

**III. Prosecutorial Misconduct**

The Petitioner argues that the State committed prosecutorial misconduct by making improper comments during closing argument and intimidating Crystal Nunley not to testify. Tennessee Code Annotated section 40-30-106(g) provides:

> A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:
>
> (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
>
> (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Tenn. Code Ann. § 40-30-106(g). The Petitioner's claim for relief is not "based upon a constitutional right not recognized as existing at the time of trial[,]" and the Petitioner's failure to present this issue on direct appeal was not "the result of state action in violation of the federal or state constitution." We conclude that the claim should have been brought on direct appeal; as such, it is waived in the post-conviction setting. See John C. Johnson v. State, No. M2004-02675-CCA-R3-CO, 2006 WL 721300, at *18 (Tenn. Crim. App., Nashville, Mar. 22, 2006). The claim is also

waived for failure to present the issue for determination in the post-conviction court. Tenn. Code Ann. § 40-30-106(g). Regardless, we conclude that the State committed no prosecutorial misconduct entitling the Petitioner to relief. Trial Counsel testified that it was his decision not to call Ms. Nunley as a defense witness, and we find no reversible error in the State's closing argument.

**IV. Jury Instructions**

Regarding jury instructions, the Petitioner argues that the trial court erred "by failing to properly recharge the jury during jury deliberations." During deliberations, the jury submitted the following question: "Can we use first degree murder on circumstantial evidence?" The trial court interpreted the question to mean: "Can we decide first degree murder based on circumstantial evidence[?]" and responded to the jury, "You may decided any question of fact, including the ultimate guilt, based on direct evidence or circumstantial evidence, or any combination of the two." There was no objection to the supplemental instruction, only that it be "subject to the qualifications in the charge." Again, we note that this issue was not presented for determination in the post-conviction court, see Tenn. Code Ann. § 40-30-106(g) and is more properly the subject of a direct appeal, see id.; Johnson, 2006 WL 721300, at *19. Nonetheless, the instant supplemental jury instruction was an accurate statement of relevant law, and the trial court admonished the jury to consider it in conjunction with the entire charge. See State v. Lamario Sumner, No. W2005-00122-CCA-R3-CD, 2006 WL 44377, at *6 (Tenn. Crim. App., Jackson, Jan. 6, 2006). This issue is without merit.

**V. Cumulative Effect**

Finally, the Petitioner asserts that he is entitled to post-conviction relief on the basis of the "cumulative effect of the aforementioned errors." As this court has not found any error with respect to the Petitioner's previous issues, we find this issue meritless.

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DAVID H. WELLES, JUDGE